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No. 99-12

In the Supreme Court of the United States

UNITY REAL ESTATE COMPANY and
BARNES & TUCKER COMPANY,
Petitioners,
v.
MARTY D. HUDSON, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES AND UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

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QUESTION PRESENTED

Beginning in 1974, the National Bituminous Coal Wage Agreements ("NBCWAs") explicitly referred to lifetime health coverage for retired coal miners and their dependents. The question presented in this case is whether the court of appeals correctly concluded that the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, does not violate the Due Process or Takings Clause of the Fifth Amendment as applied to Barnes & Tucker, a coal company that voluntarily agreed to and signed the NBCWAs of 1974, 1978, 1981, and 1984, and Unity, a company that through its coal mining subsidiary voluntarily agreed to and signed the NBCWAs of 1974, 1978, and 1981.

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BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES AND UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 178 F.3d 649. The opinion of the district court in *Unity* (Pet. App. 61a-78a) is reported at 977 F. Supp. 717. The opinion of the district court in *Barnes & Tucker* (Pet. App. 79a-95a) is not reported. An earlier opinion of the district court in *Unity* is reported at 889 F. Supp. 818.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* and 30 U.S.C. § 1232(h) (the "Coal Act"), which was enacted as Title XIX, Subtitle C, of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56. The petition does not reproduce the statute in full. Among other things, it omits the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy. Accordingly, the portions of the statute not reproduced by petitioners are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the specific circumstances of the petitioner in that case. The plurality and concurring opinions in *Eastern* ruled that Section 9706(a)(3) of the statute, 26 U.S.C. § 9706(a)(3), is unconstitutional as applied to a company that left the coal business in 1965, and thus did not sign a 1974 or later National Bituminous Coal Wage Agreement ("NBCWA"), which referred

expressly to lifetime health benefits for coal industry retirees and their dependents. In sharp contrast to Eastern, petitioner Barnes & Tucker Company ("B&T") did not leave the coal business in 1965 but remained in the industry and signed the NBCWAs of 1974, 1978, 1981, and 1984, each of which helped to foster an expectation of lifetime retiree health coverage. Similarly, petitioner Unity Real Estate Company ("Unity"), through one of its statutory "related persons," remained in the coal business and was signatory to the NBCWAs of 1974, 1978, and 1981. Petitioners are thus readily distinguishable from Eastern.

Contrary to petitioners' characterization, this case is not an effort to apply *Eastern*, but rather an attempt to eviscerate the entire statutory health case system established by Congress in the Coal Act. Through that statute, Congress sought to remedy a funding crisis in the preexisting contractual multiemployer health care plans. Recognizing the inability of collective bargaining to deal with employers that had contributed to the creation of the problem but that were no longer mining coal or participating in the collective bargaining process, Congress sought by statute to spread liability broadly among various responsible parties.

Following the decision in *Eastern*, the Commissioner of Social Security notified approximately one hundred operators that were similarly situated to Eastern (in that none of them and none of their related persons had signed a 1974 or later NBCWA) that their Combined Fund beneficiary assignments were void in light of *Eastern*, and that no further payment would be required of them under the Coal Act. Petitioners, not fitting that description, received no such notice.

If petitioners' arguments here were accepted, coal operators that signed 1974 and later NBCWAs would no longer be required to provide health benefits to nearly

70,000 retired miners and their dependents, and the Coal Act would be totally dismantled. Petitioners' all-out assault on Congress' decision in the Coal Act to impose liability on those entities, such as B&T and Unity, that signed collective bargaining agreements that explicitly referred to health coverage for life, benefitted from the multiemployer health care system, and then abandoned their retirees and dependents in the multiemployer funds is not supported by *Eastern* or by any decision before or after this Court's ruling.

A. History And Structure Of The Coal Act

The several opinions in *Eastern* addressed at some length the historical background of the Coal Act.[1] We summarize only those aspects of that background that are relevant here.

1. History Of The Coal Act

a. National Bituminous Coal Wage Agreements

Since 1946, retiree health benefits in the coal industry have been provided through a series of multiemployer health plans established in collective bargaining. From 1950 through 1974, health benefits (and pension benefits as well) were provided through a single multiemployer plan known as the UMWA 1950 Welfare and Retirement Fund ("1950 W&R Fund"). Following the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), the collective bargaining parties, the United Mine Workers of America ("UMWA") and the Bitumin-

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[1] Numerous court of appeals decisions, both before and after *Eastern*, have addressed the same history. *See, e.g., Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) (*"ABC"*); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re Blue Diamond Coal Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995).

ous Coal Operators' Association, Inc. ("BCOA"), divided the 1950 W&R Fund into four separate plans. This was accomplished in the 1974 NBCWA. *See* Pet. App. 96a-113a.

Two of the four new plans, the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan, provided health benefits, and the other two provided pension benefits. The 1974 NBCWA explicitly provided that miners and their dependents would retain their health services cards—which gave them access to health benefits through the UMWA Funds—"for life." Pet. App. 5a-6a. The 1974 NBCWA in fact contains thirteen separate references to the retention of health services cards "for life" or "until death." Pet. App. 30a. Subsequent NBCWAs, including the NBCWAs of 1978, 1981, and 1984, contain similar repeated references to the retention of health services cards "for life" or "until death' or to an "entitle[ment] to receive health benefits until death." Pet. App. 30a-33a.

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. First, for miners leaving covered service in the coal industry on or after January 1, 1976, the primary responsibility for retiree health coverage was shifted from the UMWA multiemployer system to the individual coal company that employed the miner in question. The 1974 Benefit Plan was retained as an "orphan" plan through which benefits would be provided to retirees whose former employer had gone out of business. Pet. App. 6a. Second, the employers signing the 1978 and later NBCWAs agreed to the "guarantee clause" that appears in Article XX(h) of the collective bargaining agreement. Pet. App. 6a, 121a. Under the guarantee clause, the signatory employers com-

mitted to make the contributions necessary to maintain the contractually specified benefits throughout the term of the agreement. Third, the employers that signed the 1978 and later NBCWAs also agreed to the so-called "evergreen clause." Under the evergreen clause, all of the signatory employers agreed that they would continue to contribute to the collectively bargained plans for as long as subsequent NBCWAs required such contributions, even if a particular employer did not sign such subsequent NBCWAs. Pet. App. 6a. These contractual features were perpetuated in subsequent collective bargaining agreements, *i.e.*, the NBCWAs of 1981, 1984, and 1988.

b. *The Crisis That Threatened The Multiemployer Plans And Their Beneficiaries, And The Efforts To Resolve It*

As health care costs increased, coal operators began exiting the coal industry and "dumping" their retirees into the UMWA Plans, where their benefits would be funded by the remaining signatory operators. As the number of coal operators contributing to the UMWA Plans decreased, fewer and fewer operators were left to carry the burden of rapidly rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship. Pet. App. 6a.

In 1989, as the situation worsened, the UMWA engaged in a ten-month labor dispute against the Pittston Coal Company, which was resolved only after Secretary of Labor Dole intervened and appointed a mediator. The eventual settlement provided, *inter alia*, for the creation of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide commission charged with the task of analyzing the retiree health care crisis and recommending solutions. Pet. App. 7a.

The November 5, 1990 Coal Commission report explained that the collective bargaining process—limited as it was to companies still mining coal—was inadequate to provide a long-term solution. Accordingly, the Commission recommended that Congress enact legislation to address the problem. Supp. App. 350-51, 417-28.[2] After two years of deliberations on the Coal Commission's report and recommendations, Congress enacted the Coal Act.[3]

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[2] "Supp. App." refers to the Supplemental Appendix filed by the non-government appellees in the court of appeals. A copy of the Supplemental Appendix has been lodged with the Clerk of this Court.

[3] Petitioners wrongly claim (Pet. 6) that the Coal Commission report "did not discuss any contractual terms of the pre- or post-1974 NBCWAs . . . ." To the contrary, the Coal Commission report examined the coverage of the 1950 and 1974 Benefit Plans in detail. Supp. App. 389-91. Petitioners also claim erroneously (Pet. 6 n.4) that former NBCWA signatories "were not represented on the Coal Commission," and thus could not advance their position that former signatories of expired NBCWAs had, and should have, no continuing obligation to provide benefits to miners. Petitioners' assertion is false.

One of the Commissioners was Richard M. Holsten, the former President and Chairman of Pittsburg and Midway Coal Mining Company, a former NBCWA signatory that refused to sign the 1988 NBCWA, continued to operate in the coal industry, declined to make continuing contributions to the UMWA Funds notwithstanding its evergreen clause obligations, and ultimately had to be compelled to make those payments by the courts in an action brought by the Trustees of the UMWA Funds. *See In re UMWA Employee Benefit Plans Litigation*, 782 F. Supp. 658 (D.D.C. 1992), *aff'd sub nom. UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). Not only did Commissioner Holsten play an important role in the development of the Coal Commission report, he submitted a separate written statement, which is reproduced at pages 81-83 of the report, concluding that "the present deficits can be eliminated . . . [by] involving present signatory companies only." Supp. App. 442. Moreover, former NBCWA signatories had every opportunity to attend public meetings and submit written statements to the Coal Commission, and they in fact did so. Supp. App. 476-79. August

2. *The Structure Of The Coal Act*

In the Coal Act, Congress provided that eligible beneficiaries under the statute would receive health coverage either from their former employers' individual employer plans (the continuation of which the statute required) or from one of two new trust funds to be created in accordance with the statute. Both of these new funds, the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan"), and their Trustees are respondents in this Court.

Under the Coal Act, the 1950 and 1974 UMWA Benefit Plans were merged into the Combined Fund as of February 1, 1993. 26 U.S.C. § 9702. The Combined Fund provides health and death benefits to coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Plans. *Id.* at § 9703(a), (b)(1), (e), (f). The 1992 Plan was created by the Coal Act to provide benefits to eligible retirees and their dependents who are not beneficiaries of the Combined Fund, who retired prior to October 1, 1994, and who are not receiving health care coverage directly from their former employers. *Id.* at § 9712.

The coal operators that voluntarily participated in the UMWA Funds pursuant to the terms of their collective bargaining agreements with the UMWA, including B&T

Keller of Bellaire Corporation (which later unsuccessfully challenged the Coal Act in a case in which it was represented by one of the current counsel for Unity and B&T, *Bellaire Corp. v. Chater*, 995 F. Supp. 125 (D.D.C. 1997)) appeared in person before the Coal Commission, and several representatives of former NBCWA signatories (including Mr. Smock (whose law firm represents Unity and B&T in this Court), Mr. Laurent (a former member of Mr. Smock's firm who represented Unity and B&T before the district court and court of appeals), Mr. Dials, Mr. Keller, and Mr. Miercort) submitted written statements to the Coal Commission.

and the coal operators affiliated with Unity, are required to finance the benefits provided by the Combined Fund. Coal Act premiums are based on the number of Combined Fund beneficiaries that have been assigned to the operators by the Secretary of Health and Human Services (now, the Commissioner of Social Security) under Section 9706 of the Act. With respect to the 1992 Plan, the Coal Act requires the last signatory operator to which each 1992 Plan beneficiary is attributable to pay a monthly per beneficiary premium to cover the cost of that beneficiary's health care. 26 U.S.C. § 9712(d)(1)(B), (3), Because the last signatory operators for many 1992 Plan beneficiaries are no longer in business and therefore do not pay monthly per beneficiary premiums, the remaining funds necessary to provide benefits to beneficiaries of the 1992 Plan are provided through an annual prefunding premium assessed against operators that were signatory to the 1988 NBCWA. *Id.* at § 9712(d)(1)(A).

B. B&T's Involvement In The Coal Industry, And The Assignment Of Coal Act Beneficiaries To B&T

B&T seeks to minimize its extensive involvement in the coal industry by describing only its recent activities. Pet. 10. B&T thus attempts to ignore the fact that it was engaged in large-scale coal production from approximately 1905 to 1986. At the peak of its coal mining operations from the 1970s to the 1980s, B&T employed approximately 1100 UMWA represented miners. Pet. App. 9a. As a member of BCOA, B&T was signatory to the 1971, 1974, 1978, and 1981 NBCWAs. After withdrawing from the BCOA, B&T agreed to be bound by the 1984 NBCWA on a "me-too" basis. *Id.*

B&T also contributed significantly to the developing financial crisis of the UMWA Benefit Plans. At the expiration of the 1984 NBCWA, B&T discontinued its individual employer health plan and dumped its retirees into the 1974 Benefit Plan, to receive benefits paid for

by the remaining contributing employers. B&T's actions in that regard, the resulting significant increase in the beneficiary population of the 1974 Benefit Plan, and the financial impact of such additional beneficiaries on the UMWA multiemployer health care system, are addressed in *UMWA v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). *Nobel* involved retirees from B&T and six other large coal industry employers that discontinued retiree health benefits even though the employers remained in business. The district court, affirmed by the court of appeals, held that the retirees (together with their spouses and dependents) could turn to the 1974 Benefit Plan for their health care coverage even though the former employers were still in business. Virtually overnight, this added some 2000 new beneficiaries to the 1974 Benefit Plan, all of whom were to receive benefits paid for by coal operators with whom they had no employment relationship, while B&T and the other six former employers contributed nothing. This sequence of events directly contributed to the financial crisis that led to the Coal Act. Pet. App. 22a.

Under the Coal Act, the Secretary assigned B&T approximately 1250 Combined Fund beneficiaries as of February 1, 1993, the day on which the Combined Fund began providing health coverage under the statute. Supp. App. 510. Mortality has since reduced this number considerably. B&T is also the last signatory operator to which approximately 20 beneficiaries of the 1992 Plan are attributable. Supp. App. 518-19.

C. Unity's Involvement In The Coal Industry, And The Assignment Of Coal Act Beneficiaries To Unity

By claiming that Unity is "a family business that owns a small commercial building and a parking lot," Unity also attempts to distance itself from its extensive involvement in the coal industry. Pet. 10. Unity is covered by the

Coal Act as a "related person" to several companies that had mined coal for decades using hundreds of UMWA miners. These companies were ultimately absorbed into Unity. Pet. App. 8a. Among these companies were South Union-PA and South Union-WV. South Union-PA had mined coal since 1923, and had signed the 1947 NBCWA, the 1950 NBCWA, and the amendments thereto through 1961, when it ceased its mining activities. South Union-WV was incorporated in 1974 as a wholly-owned subsidiary of Unity, and mined coal from 1975 through 1981 using UMWA-represented miners. South Union-WV signed the 1974, 1978, and 1981 NBCWAs, although a bankruptcy court later allowed it to repudiate the 1981 NBCWA. Pet. App. 8a. After South Union-WV's bankruptcy, Unity's president wrote to the 1974 Benefit Plan and confirmed that South Union-WV's eligible retirees and their dependents would receive health coverage from the 1974 Plan, even though South Union-WV was out of business and no longer contributing to the UMWA Funds. Pet. App. 66a.

Under the Coal Act, the Secretary assigned Unity 78 Combined Fund beneficiaries as of February 1, 1993, based on Unity's relationship to coal industry employers that are no longer in existence. Supp. App. 495. In addition, Unity is responsible for the health benefits of two 1992 Plan beneficiaries, for whom a coal industry employer related to Unity is the last signatory operator. Supp. App. 498-501.

D. Proceedings In The Courts Below

B&T and Unity filed complaints against the Trustees of the Combined Fund and the Trustees of the 1992 Plan challenging the constitutionality of the Coal Act. The United States intervened in both cases to defend the validity of the statute.

B&T and Unity moved for preliminary injunctions to prevent the Trustees from enforcing the Coal Act against

them during the pendency of the cases. B&T voluntarily withdrew its motion for a preliminary injunction before the district court acted on it. After receiving recommendations from the magistrate judge (1994 U.S. Dist. LEXIS 20403, 1995 U.S. Dist. LEXIS 8585), the district court granted Unity's motion for a preliminary injunction. 889 F. Supp. 818 (1995). The court rejected Unity's Due Process Clause argument but granted the requested interim relief on Takings Clause grounds. In March 1997, after numerous courts, including the Third Circuit, had sustained the validity of the Coal Act (*see, e.g., Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996)), the district court granted the Trustees' and the government's motions for summary judgment and denied Unity's and B&T's motions for summary judgment. Pet. App. 61a-95a.

The court of appeals heard argument on the appeals by Unity and B&T while *Eastern* was under submission in this Court. At the oral argument, the court instructed the parties to submit letter memoranda on the significance of *Eastern* once that case was decided. Following the submission of those memoranda, the court heard further oral argument and directed the parties to file post-argument briefs. The court of appeals then affirmed. Pet. App. 1a-60a.

In sustaining the Coal Act as applied to Unity and B&T, the court of appeals held that *Eastern* is distinguishable on its facts and does not support petitioners' position. Relying on both the plurality and concurring opinions in *Eastern* (*see* 118 S. Ct. at 2139-40, 2150, 2152 (plurality); 2159 (Kennedy, J., concurring in the judgment and dissenting in part)), the court ruled that *Eastern* is distinguishable because, whereas Eastern did not sign a 1974 or later NBCWA, B&T signed the 1974, 1978, 1981, and 1984 NBCWAs, and Unity, through its statutory related person (the wholly owned subsidiary South Union-WV), signed the 1974, 1978, and 1981

NBCWAs. In the court's words, "[b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from Eastern Enterprises. Language in the plurality and concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion." Pet. App. 17a. The court held that the factual distinction between Eastern and petitioners "compels the conclusion that *Eastern* is not on all fours with the case before us." *Id.*

After an extensive review of the parties' arguments, the court concluded (Pet. App. 24a-25a) that Congress acted within its authority:

> We cannot say that it was irrational for Congress to charge the miners' former employers with the costs of their benefits, when the miners qualified for lifetime benefits from the Trustees because of their former employment . . . and the employers' departure from the industry contributed to the problem confronting the Trustees.

The court explained that, contrary to petitioners' contention, the constitutionality of the Coal Act involves an issue different from the question of what the collective bargaining agreements required (*id.* at 27a-28a):

> [T]he contracts did not provide for the payments mandated by the Coal Act. If the contracts had so provided, the Coal Act would have been unnecessary . . . . But this is not an action brought for contractual violations. We focus our attention instead on what conclusions Congress might rationally draw about the parties' relations and expectations, and what it might fairly do to close the gap between the contractual obligations of the coal companies and the Funds' actual liabilities.

After considering not only the relevant contractual provisions but also their historical context, the Coal Commission report, prior judicial decisions, and this Court's opinions in *Eastern*, the court ruled that it would "defer

to Congress's judgments on the nature of the problem before it, including judgments about causation and reasonable expectations." *Id.* at 38a. In the court's words,

> we conclude that Congress could reasonably have reached the conclusions it did about the expectation of lifetime benefits and about the coal companies' responsibility for the situation in which the Funds found themselves after the changes of the 1970s and 1980s.

Id. at 28a.

Having sustained the congressional assessment of the nature and source of the problem, the court turned to the means chosen by Congress to address it. The court held that "the Coal Act's retroactivity does not render it irrational in violation of due process." Pet. App. 38a. The court noted that the retroactivity in this case is "significantly less extensive than that in *Eastern*" (*id.*) and less extensive than that previously sustained under other federal statutes such as the Black Lung Benefits Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (*id.* at 39a n.12). The court emphasized, however, that it did not rely solely on the length of retroactivity but instead "assess[ed] the relationship of the retroactively imposed liability to the governmental interests asserted in its defense." *Id.* at 39a-40a. As a result of petitioners' participation in the 1974 and later NBCWAs, the court held, petitioners "created reasonable expectations about benefits and established a funding structure vulnerable to 'dumping' retirees when companies left the industry." *Id.* at 46a. Because petitioners thus contributed both to "the instability of the pre-Coal Act benefit funding structure" and the beneficiaries' "expectation of lifetime benefits", the court said (*id.* at 43a), Congress reasonably could conclude that retroactive legislation was warranted to address the problem.

ARGUMENT

The court of apeals' decision is correct and further review is not warranted. The decision is fully consistent with this Court's ruling in *Eastern* and accurately reflects the limited nature of that ruling. The court applied the well-established legal standard governing substantive due process challenges to economic legislation, and it did so with proper regard for the retroactive aspect of the statute at issue.

In sustaining the validity of the Coal Act as applied to post-1974 NBCWA signatories, the court of appeals reached the same result as the D.C. Circuit, the first post-*Eastern* court to address the constitutionality of the statute as applied to such employers. *ABC*, 156 F.3d at 1253-58. *See also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999) ("the considerations bearing upon whether Congress acted rationally in imposing retroactive liability on the NBCWA signatory in Eastern Enterprises are different than those relating to the rationality of imposing liability on members of a control group of a 1978 or subsequent benefit plan signatory"); *Holland v. Robert Coal Co.*, 172 F.3d 919, 1998 WL 794832 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1803 (1999); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161 (3d Cir. 1999), *cert. pending*, No. 99-262 (filed Aug. 12, 1999). There is no conflict among the circuits.

If petitioners' argument were accepted, the entire congressional scheme for protecting retiree health benefits in the coal industry would be defeated.[4] *Every* signatory employer (including signatories to the 1988 NBCWA, the collective bargaining agreement in effect when the Coal Act was passed) could make the same argument as peti-

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[4] Petitioners themselves acknowledge that "the vast majority of companies subject to the Coal Act are signatories of post-1974 NBCWAs." Pet. 23.

tioners, namely, that the contribution obligations to which they agreed by contract were limited to the terms of the contracts they signed and that therefore Congress' effort to impose a new statutory obligation covering the period *after* the term of those agreements is invalid. As the court of appeals correctly recognized, such an outcome would be irreconcilable not only with several decisions upholding the Coal Act after *Eastern* but also with the reasoning of the plurality and the concurrence in *Eastern* itself and with this Court's own precedents establishing that the legislative authority of Congress is not confined by the terms of private contracts. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935).

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *EASTERN*

Petitioners' argument that the court of appeals improperly refused to follow *Eastern* is incorrect. First, the "retroactivity principles" that petitioners attempt to derive from the plurality and concurring opinions in *Eastern* do not represent the holding of the Court and do not have some independent constitutional status apart from the two separate Fifth Amendment provisions on which the Members of the Court who voted in favor of *Eastern* relied. Second, petitioners, who signed the 1974, 1978, 1981, and (in B&T's case) 1984 NBCWAs, are not similarly situated to Eastern, which left the coal industry in 1965 and did not sign an NBCWA after 1964. Third, petitioners' argument that they have no contractual obligation to provide benefits to Coal Act beneficiaries falls short, because Congress' legislative authority is not limited by contractually binding promises. Fourth, the court of appeals properly rejected petitioners' claims of unconstitutional "retroactivity." Fifth, petitioners' argument that the

Coal Act unconstitutionally takes their property is without merit and is not supported by the decision in *Eastern*.

A. Petitioners Misstate The Holding Of *Eastern*

Although petitioners acknowledge, as they must, that there was no opinion for the Court in *Eastern*, they nevertheless contend that the Court "proposed a four-part test for assessing the constitutionality of retroactive employee benefits funding legislation" and that Justice Kennedy and the plurality relied on the same "retroactivity principles." Pet. 8, 9, 14. Applying this alleged "four-part test" to themselves, petitioners conclude that the Coal Act is "plainly unconstitutional" as applied to B&T and Unity. Pet. 15-17. This reasoning is faulty for several reasons.[5]

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[5] The argument now adopted by petitioners was not previously advanced by them, but was made to the court of appeals by *amici curiae* LTV Corporation and North American Coal Company. Pet. App. 16a. Petitioners—now represented by, among others, counsel for LTV and North American in the court below—have elected to de-emphasize their own prior arguments and to feature instead the arguments favored by LTV and North American.

LTV and North American failed long ago in their own attacks on the constitutionality of the Coal Act. *In re Chateaugay*, 53 F.3d 478 (2d Cir.); *Bellaire*, 995 F. Supp. 125 (Bellaire is a North American subsidiary). After this Court's decision in *Eastern*, LTV and North American have sought to use other cases as vehicles to repeat their general assault against the Coal Act as applied to post-1974 NBCWA signatories. In each of these cases, LTV and North American have sought to convert narrower attacks on the statute into broader challenges akin to those that LTV and North American unsuccessfully pursued on their own behalf in the past. Both the Third Circuit in this case and the D.C. Circuit in *ABC* have rejected these efforts. Pet. App. 16a; *ABC*, 156 F.3d at 1257-58. Earlier this year, the Court denied a petition for a writ of certiorari filed by Robert Coal Company, which advanced similar arguments to those set forth by LTV and North American as *amici* in *Unity* and *ABC*. 119 S. Ct. 1803 (1999). Counsel of record for Robert Coal in this Court (but not in the district court or the court of appeals) was the same counsel who represented LTV and North American as *amici curiae* in *Unity* and *ABC*. It appears, therefore, that this case and others are being used as a front for larger entities, such as LTV and North American, to destroy the Coal Act and shed themselves of liability for the health care of their former employees.

To begin with, neither the plurality opinion nor the concurrence purported to create any new "test" for determining whether economic legislation such as the Coal Act is "unconstitutional." Instead, they applied well-established, but different, constitutional principles to the specific case before the Court. Applying "the three factors that traditionally have informed our regulatory takings analysis," the plurality concluded that the Coal Act violated the Takings Clause as applied to Eastern. 118 S. Ct. at 2149 (plurality). Justice Kennedy rejected the plurality's reliance on the Takings Clause but decided that the Coal Act as applied to Eastern violated "accepted principles" of this Court's due process jurisprudence. *Id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part). The plurality declined to reach the due process question and acknowledged that the Court "has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* at 2153 (plurality).

Petitioners dismiss the diagreement between the plurality and concurring opinions as a disagreement "only on 'doctrinal categorization' " and declare that the plurality and Justice Kennedy " 'agreed on legal principles.' " Pet. 23 (quoting law review note). Petitioners avoid any argument addressed to either the Takings Clause or the Due Process Clause and amalgamate the two distinct concepts by asserting that their "test" demonstrates that the Coal Act is in some generalized way "unconstitutional" as applied. Pet. 14.

But this is not the way courts determine the constitutionality of statutes. The "retroactivity principles" that petitioners purport to extract from the plurality and concurring opinions in *Eastern* have no independent constitutional status; there is no constitutional right, for example, to be free from retroactive statutes or from the imposition of "substantial" liability. For this very reason, the court of appeals rejected an identical argument offered by

LTV and North American below. Pet. App. 16a. The D.C. Circuit in *ABC* similarly rejected the claim that *Eastern* requires that the Coal Act be held generally "unconstitutional" on the basis of this extra-constitutional "test":

> We begin our analysis with a bedrock principle of constitutional adjudication. . . . The Constitution prohibits certain governmental action through specific clauses. . . . Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses. . . . We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.

ABC, 156 F.3d at 1253-54.

B. Petitioners Are Not Similarly Situated To Eastern

Even if petitioners had properly presented claims under the Due Process Clause and the Takings Clause rather than their generalized claim of "unconstitutionality," *Eastern* would not support petitioners' position. The lynchpin of the plurality and concurring opinions in *Eastern* was that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 118 S. Ct. at 2142-43 (plurality), 2159 (Kennedy, J., concurring in the judgment and dissenting in part). B&T, by contrast, actively mined coal until 1986, and signed the 1974, 1978, 1981, and 1984 NBCWAs, and Unity's subsidiary, South Union-WV, actively mined coal until 1981, and signed the 1974, 1978, and 1981 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. The plurality stated, for example,

that "[t]he 1974 NBCWA . . . amend[ed] previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage." 118 S. Ct. at 2139-40. Similarly, the plurality distinguished the NBCWAs that Eastern had signed from those that came later:

> [W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*

Id. at 2150 (emphasis added); *see also id.* at 2153 ("There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, *and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's.*") (emphasis added).

Justice Kennedy likewise concluded that Eastern

> was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation *was created by promises and agreements made long after Eastern left the coal business.*

Id. at 2159 (emphasis added). The four dissenting Justices in *Eastern* took the view that, while implicit promises were made, and legitimate expectations created, long before the 1974 NBCWA, those commitments were made explicit in the 1974 and later NBCWAs. *Id.* at 2161 (Stevens, J., dissenting) ("their implicit agreement was made explicit in 1974").

The common theme among the various opinions in *Eastern* is that the 1974, 1978, and subsequent NBCWAs

created in retired coal miners a reasonable expectation of lifetime health benefits. As stated by the D.C. Circuit in *ABC*, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." 156 F.3d at 1257; Pet. App. 23a-25a. Thus, petitioners, who signed the 1974, 1978, 1981, and 1984 NBCWAs and thereby helped to foster an expectation of lifetime health coverage, cannot avoid their Coal Act liabilities by claiming that they are similarly situated to Eastern.

C. Petitioners' Argument Is Based On A False Premise; Congress' Legislative Authority Is Not Limited By Contractually Binding Promises

Petitioners' primary argument for avoiding Coal Act liability is that they have no contractual obligation to provide benefits to Coal Act beneficiaries, since the employer contribution obligations imposed by the 1974 and later NBCWAs were limited to the term of each contract. Pet. 16-17. For this reason, petitioners claim that the retroactive Coal Act liabilities imposed on them are "vastly broader" than any of their past promises or commitments. *Id.* This argument is fundamentally flawed, because Congress, in exercising its legislative power, is not fettered by the terms of private contracts. *See Connolly*, 475 U.S. at 223-24 ("Contracts, however express, cannot fetter the constitutional authority of Congress") (quoting *Norman*, 294 U.S. at 307-08). Indeed, if there were a requirement that legislation merely track contractual promises, there would be little impetus to enact legislation. As the court of appeals recognized, "[t]he *Eastern* plurality did not reject the *Connolly* principle that government may do more than require private parties to live up to their contracts." Pet. App. 44a.

The rationality of Congress' decision to provide for the stable financing of health care benefits for coal industry retirees does not depend on a finding of a contractually binding "promise" or "commitment," however those words may be defined. The legislative purpose is a legitimate governmental objective that Congress is authorized to pursue in the exercise of its Article I powers. The only question is whether Congress has acted rationally and non-arbitrarily in imposing liability on the very employers that created, participated in, and benefitted from the UMWA multiemployer health care system, that signed collective bargaining agreements that explicitly referred to health coverage for life, and that formerly employed retirees who were continuing to receive benefits from the multiemployer system at the time that Congress acted. As summarized by the court of appeals, "we think that explicit promises are not necessary in order to justify congressional action. The question is what reasonable expectations the coal companies' actions created." Pet. App. 26a.

The NBCWAs signed by petitioners in 1974, 1978, and 1981 and by B&T in 1984 referred repeatedly to health care coverage "for life" or "until death," even though the funding mechanism was tied to the term of each successive NBCWA. Pet. App. 30a-31a. Petitioners' efforts to deny the significance of the contractual references to lifetime health coverage are based on "a strained reading of the terms 'for life' and 'until death,' which refer to persons (the miners and their dependents) and not to the continuing existence of an NBCWA." *Id.* at 31a. As the court of appeals correctly observed, all of petitioners' arguments "have the same fundamental weakness": they "go to the contract and not to the reasonable expectations that might have been created by the contract." *Id.* at 27a. This conclusion is entirely consistent with the view expressed by all members of the Court in *Eastern* that the 1974 and subsequent NBCWAs expressly referred to the

provision of lifetime health benefits. 118 S. Ct. at 2139-40, 2150, 2153 (plurality), 2159 (Kennedy, J., concurring in the judgment and dissenting in part), 2161 (Stevens, J., dissenting).[6]

Petitioners also contend that the Coal Act cannot be upheld on the ground that petitioners' actions "helped to create the financial crisis" in the UMWA plans. Pet. 20. Petitioners ignore their extensive history in the coal industry, which lasted for many decades and did not end until more than 20 years after Eastern left the coal industry. Unity mined coal for 58 years and B&T for 80. Pet. App. 37a. As the court of appeals commented:

> Coal companies such as Unity and B&T received benefits from the steady expansion of health and

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[6] Petitioners attempt to support their position by citing language in *Davon*, 75 F.3d at 1128, that "[n]othing radical happened in 1974." Pet. 14. But *Davon* is not at all helpful to petitioners' argument. *Davon*, like several other decisions before *Eastern*, sustained the Coal Act even as applied to pre-1974 signatories. It was in the context of rejecting an argument that pre-1974 NBCWA signatories should be relieved of Coal Act liability that the *Davon* court made the statement on which petitioners now seek to rely. *Davon* found the proposed distinction between pre-1974 signatories and signatories to 1974 and later agreements "wholly unpersuasive." 75 F.3d at 1128. The court explained:

> Each consecutive NBCWA, including those after 1974, accomplished the same end—to provide benefits to miners until the next NBCWA—using the same means—funding on a multi-employer basis. *Nothing radical happened in 1974.* As we stated in the due process context, the promise of lifetime benefits was not an unforeseeable inclusion in an NBCWA; every coal operator that participated in the multi-employer plans contributed directly to the retirees' legitimate expectations of lifetime benefits.

Id. (emphasis added). The five Justices who voted in favor of Eastern did not accept this reasoning; they concluded that something quite significant occurred in 1974 and thereafter, because it was in those years (and not before) that the collective bargaining agreements expressly referred to lifetime health benefits. It was this very fact that led the plurality and concurring Justices to rule in favor of Eastern, which did not sign an NBCWA after 1964.

> retirement benefits, including wage concessions and union agreement to mechanization, during that period. *Their long-term participation made it particularly understandable that miners would expect that the companies' adherence to promises of lifetime benefits in the NBCWAs would be honored.*

Id. (emphasis added).

Moreover, unlike Eastern, Unity and B&T, as BCOA members, participated in the negotiations that created the post-1978 funding structure, and then dumped their retirees into the UMWA Fund without paying for their continuing health benefits. In Justice Kennedy's concurrence in *Eastern*, he stressed that Eastern, as a pre-1974 signatory, was not responsible for creating either the expectation of lifetime benefits or "for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy." 118 S. Ct. at 2159. The same clearly cannot be said for either B&T or Unity. It is undisputed that B&T was a large employer whose departure from the industry added more than a thousand beneficiaries to the Funds as so-called "orphans" who had been abandoned by their former employer—B&T. B&T's dumping of beneficiaries into the Funds clearly helped create the financial crisis that ultimately led to the Coal Act. *Nobel*, 720 F. Supp. 1169; Pet. App. 22a, 25a. Similarly, when Unity's subsidiary declared bankruptcy, it informed the Funds that it was no longer in business and would no longer provide health benefits for its retirees, thus forcing the 1974 Fund to take responsibility for those retirees without any funding from Unity or any members of its corporate family. Pet. App. 22a.

D. The Court Of Appeals Properly Rejected Petitioners' Claims Of Unconstitutional "Retroactivity"

Petitioners contend that, as applied to them, the Coal Act is impermissibly retroactive. The argument is defective in several respects.

First, although the point is undisputed, petitioners nowhere acknowledge that the Coal Act provides benefits purely on a prospective basis and does not require funding for *any* health care received before the statute's enactment. To the extent the statute is retrospective at all, it is retrospective only in the sense that other federal statutes, such as the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.*, and CERCLA, 42 U.S.C. §§ 9601 *et seq.*, are also retrospective: In establishing the existence and extent of current and future liabilities, those laws look in part to events that occurred in the past. But, as the decisions sustaining the Black Lung Benefits Act and CERCLA show, *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), that fact alone is insufficient to establish that such laws are invalid, even where the coal industry employment or polluting discharge in question occurred *decades* before the statutes' enactment.

Second, petitioners exaggerate the extent of the Coal Act's "retroactivity." By focusing on the beginning rather than the end of the terms of the last coal industry collective bargaining agreements that they signed, petitioners assert that the Coal Act involves eight (rather than four) years of retroactivity as applied to B&T and eleven (rather than eight) years of retroactivity as applied to Unity. On this dubious reasoning, the statute would involve nearly five years of retroactivity even with respect to those operators that were NBCWA signatories at the time the Coal Act was passed. That is so because the then-current NBCWA was the 1988 NBCWA, the term of which began on February 1, 1988, well over four and a half years before the statute's enactment. This point

confirms that, unlike this Court's decision in *Eastern*, petitioners seek to destroy the entire Coal Act.

In any event, even using petitioners' questionable arithmetic, the retroactivity of the Coal Act as applied to petitioners does not remotely approach the degree of retroactivity that five Justices found offensive in *Eastern*. According to the plurality and concurring opinions, the employer in that case left the coal industry in 1965, more than 27 years before the Coal Act was passed. As the court of appeals here concluded, "[t]he retroactivity is significantly less extensive than that in *Eastern*." Pet. App. 38a.

Perhaps most important, petitioners' simplistic counting of years neglects altogether the close relationship among the liability imposed by the Coal Act, the collective bargaining agreements signed by petitioners (with their frequent references to lifetime health care), petitioners' own conduct in "dumping" their retirees into the contractual multiemployer plans (where for years they received benefits paid for entirely by other employers), and the legitimate governmental interests supporting the challenged legislation. In the court of appeals' words, "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." Pet. App. 40a.

E. Petitioners' Argument That The Coal Act Unconstitutionally Takes Their Property Is Without Merit

To the extent that petitioners continue to pursue any argument under the Takings Clause, they focus primarily on a comparison between the amount of their Coal Act obligations and the amount of their current assets and income. Claiming that the Coal Act effectively will put them out of business, petitioners apparently contend that

the statute is invalid for that reason alone. Pet. 15.[7] As the court of appeals observed, however, five Justices in *Eastern* concluded that the Takings Clause does not provide the proper basis for review of economic regulatory legislation like the Coal Act. Pet. App. 15a, 17a; *see also Eastern*, 118 S. Ct. at 2154-58 (Kennedy, J. concurring in the judgment and dissenting in part); 2161-64 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). Even putting that fact aside, petitioners' position is without merit. The constitutionality of a federal statute does not depend on the vagaries of a particular corporation's current economic performance, future prospects, or past disposition of assets.

As the court of appeals correctly observed, this Court "has repeatedly rejected the argument that a tax—even a tax on a small set of businesses—may violate due process or constitute a taking simply because it may force some of the regulated entities out of business . . . ." Pet. App. 48a, citing *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373-74 (1974). The constitutionality of a statutory assessment "should not depend on the happenstance of the financial condition of the assessed [entity] at the time of the assessment." *Branch v. United States*, 69 F.3d 1571, 1577 (Fed. Cir. 1995) (no taking occurred where losses by an insolvent bank led to assessments against sister banks that exceeded those banks' net worth), *cert. denied*, 519 U.S. 810 (1996). Any other rule, as the court of appeals properly recognized, "would

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[7] At least in the case of B&T, the prophecies of doom have been overstated for some time. B&T has been asserting for nearly six years that it is on the verge of bankruptcy as a result of its Coal Act obligations. *See* B&T's Mem. of Law in Support of Its Mot. for Prelim. Inj. (filed Nov. 12, 1993), at 14-15 ("[B&T's] payments of the sums to be demanded under the Coal Act will consume all of its cash and other available assets within approximately 16 months, at which time [B&T] will be bankrupt . . . [and] will not be able to remain a viable business"). The error in B&T's prediction currently stands at four and a half years, and it grows daily.

open up a Pandora's Box that would throw into question every economic regulation imaginable." Pet. App. 51a-52a. The proper inquiry concerns not the size of a liability as a percentage of current assets or income but the proportionality of the assessment to the "legitimate obligations society may impose on individual entities," given all the circumstances involved. *Id.* at 53a. The court of appeals correctly concluded that the Coal Act satisfies this proportionality requirement.

II. THE COURT OF APPEALS CORRECTLY INTERPRETED *MARKS v. UNITED STATES*, AND PETITIONERS' OTHER PROPOSED GROUNDS FOR REVIEW ARE INSUBSTANTIAL

In a last-ditch effort to manufacture a legal error warranting this Court's attention, petitioners critique the court of appeals' application of this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977). Pet. 24-27. Petitioners' criticisms are unjustified. *Marks* states that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation and citation omitted). But this approach is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court." *Rappa*, 18 F.3d at 1058; *see also King*, 950 F.2d at 782.

The court of appeals here correctly observed that "Justice Kennedy's substantive due process reasoning is

not a 'narrower' ground that we might take to constitute the controlling holding." Pet. App. 16a. The D.C. Circuit came to precisely the same conclusion. *ABC*, 156 F.3d at 1255 ("as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's taking analysis."). In such circumstances, only the result in the case before this Court is binding, and only in substantially identical cases. Pet. App. 16a; *ABC*, 156 F.3d at 1254-55.

Petitioners' claim of a conflict between this case and the D.C. Circuit's decision in *King v. Palmer*, 950 F.2d at 783, is not justified. The statement quoted in isolation by petitioners (Pet. 26) about whether the court in *King* was "free" to combine the concurrence and dissent in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987), to form a *Marks* majority can be understood only in the context of the subject at issue in *King* and the various opinions in *Delaware Valley*. As the D.C. Circuit's opinion explained, just as Justice O'Connor's concurring opinion could not fairly be said to be a logical subset of the plurality opinion, so the concurrence was also different from the dissent, and it was not at all clear whether and in what circumstances Justice O'Connor and the dissenting Justices would agree that a risk enhancement should be awarded for an attorney's contingency fee. 950 F.2d at 782-84. It was in these circumstances that the D.C. Circuit made the statement quoted by petitioners. In *Eastern*, by contrast, Justice Breyer's dissent expressly agreed with Justice Kennedy that the "Takings Clause does not apply." 118 S. Ct. at 2161. The court of appeals hardly can be faulted, therefore, for concluding that five Members of the Court have rejected petitioners' Takings Clause rationale. In any event, petitioners have fallen far short of demonstrating that there is any persistent or intractable problem in interpreting and applying decisions of this Court in which there is no majority opinion.

Petitioners are also wrong in suggesting that the Court's recent grant of review in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999) (No. 98-1161), has something to do with this case. *Pap's* involves a First Amendment challenge to a local ordinance banning nude dancing. The City of Erie contends that the Pennsylvania Supreme Court erroneously failed to follow this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Nothing that the Court could decide in *Pap's* would bear on the propriety of the Coal Act's application to post-1974 NBCWA signatories like petitioners.

Nor is there any basis for petitioners' claim that the federal courts now are "divided about whether the burdening of a 'specific' property interest is an essential element of any Takings Clause claim." Pet. 27. *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799 (7th Cir. 1999), *cert. pending*, No. 99-420 (filed Sept. 7, 1999), is in no way inconsistent with the court of appeals' decision here. The Seventh Circuit there simply followed this Court's decisions in *Connolly*, 475 U.S. 211, and *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and rejected Due Process Clause and Takings Clause challenges to the Multiemployer Pension Plan Amendments Act of 1980. No issue regarding the defendant employer's lack of a "specific property interest" affected by the statute was raised or discussed. The second case on which petitioners rely for the alleged division among federal courts, *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*, 18 F. Supp. 2d 355, 369 (D. Vt. 1998), held that the challenged Medicare fee limits imposed no legal compulsion on plaintiffs and therefore could not possibly effect a taking. The court *explicitly* found it unnecessary to decide the issue as to which petitioners contend the courts are in conflict. *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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